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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935

Nos. 403, 404

GEORGE ASHWANDER, ET AL.,
Petitioners,

v.

TENNESSEE VALLEY AUTHORITY, ET AL.,
Respondents

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR RESPONDENT ALABAMA POWER COMPANY

WM. LOGAN MARTIN,
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ALABAMA POWER COMPANY

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MEMORANDUM FOR RESPONDENT ALABAMA POWER COMPANY

The respondent Alabama Power Company deeming it appropriate to summarize its position with reference to the controversy as shown by the record, and in order that no unfavorable inference may be drawn from any failure on its part to appear by counsel or to file an answer to the petition for writs of certiorari (Compare *Corbus v. Alaska Treadwell Gold Mining Co.*, 187 U. S. 455, 459, 47 L. ed. 256, 258; concurring opinion of Mr. Justice Brandeis in *Hill v. Wallace*, 259 U. S. 44, 74,

66 L. ed. 822, 832) makes the following answer to the petition for writs of certiorari.

In 1933 after the Tennessee Valley Authority Act had become a law the respondent Company was confronted with aggressive action by TVA looking to the acquisition of part of the Company's existing markets (Findings 26, 27, 28 and 30, R. II, pp. 1042-44). Apparently, as asserted by its announced plans and public releases, TVA had recourse to unlimited federal funds, with which to construct transmission lines or finance distribution systems. Several municipalities had voted to establish municipal plants to become distributors of TVA power and had made applications to the Federal Emergency Administration of Public Works for loans with which to construct such plants. The Company protested the granting of these loans. Its protests were promptly overruled by the Alabama branch of the Public Works Administration and subsequently by the Administration in Washington (R. II, pp. 488-89). Public statements made by TVA from time to time showed close cooperation with the Public Works Administration (Finding 109, R. II, p. 1074). By these means the Company was faced with a destructive competition by immediate duplication of its transmission lines, as well as by a duplication of its distribution systems in the Muscle Shoals area, to be served in each case by TVA power. As the threatened procedure could have been made effective in substantial respects through the use of emergency relief funds in privity of contract with TVA, the management of the Company was of the opinion that an effective and orderly test of the legalities was im-

practicable in time to prevent irreparable injury. Under these circumstances the Company considered that the only alternative was to yield to the insistence of TVA, obtain the best price available for the transmission systems demanded by the Authority as a minimum, and protect the Company with the most favorable agreement for the limitation of competition by the Authority through the use of federal funds (R. II, pp. 488-89). The Company of course knew and the contract contemplated that the properties were to be used by TVA in the operation of a commercial electric system.

Prior to the execution of the contract of January 4, 1934, the construction of Norris and Wheeler Dams had been begun, designed for production of power. Subsequent to the signing of the contract construction was begun of another dam at Pickwick Landing on the Tennessee River. Other power dams are announced. Upon the completion of Wheeler and Norris Dams large blocks of power will be available for distribution in the markets now completely served by the Company (R. II, pp. 1049-50 and 1056-57), with provision for very large additional power capacity on the emplacements provided at Wheeler, Pickwick and Wilson and not at the outset equipped with turbines. The steam electric plant at Muscle Shoals, owned by the Government and now under the control of TVA, has a continuous capacity to produce three hundred and fifty million kilowatt hours per annum.

The declared policy of TVA to manufacture and distribute this power and engage in supplying the public with electric service is one of vital consequence to the

continued existence of this respondent and to the investment which thousands of individuals and institutions hold in its securities. The assertion of the powers which TVA claims under the Tennessee Valley Authority Act will greatly impair, if not entirely destroy, the properties not only of this company but of other utility companies serving areas within transmission distance of the various plants operated or in course of construction by TVA.

For these reasons, when the stockholders asserted the right to test the question whether the procedure of TVA was in violation of the Constitution and was a usurpation of federal functions under an invalid Act, threatening the franchises, property and existence of the corporation, this Company neither challenged the right nor the propriety of their action.

In No. 404, in which TVA opposes the granting of a writ of certiorari, plaintiffs filed an amended bill (R. III, p. 1278) seeking a declaratory judgment, and praying that TVA be enjoined from the sale of power wherever generated in competition with the Power Company (R. II, pp. 1283-88).

The contract of January 4, 1934, covered directly the sale of transmission lines and certain rural and urban distribution systems. It left unprovided the supply of power for and the ultimate fate of the seventeen distribution systems serving the municipal defendants. These were confronted with direct threat of duplication by TVA or by the municipalities in privity with TVA. Under these circumstances the Company gave the option to TVA to purchase the distribution systems (Contract

of August 9, 1934, R. I, pp. 158-164). The stockholders' suit challenged the validity of this transfer and option, as being in direct furtherance of a violation of the Constitution because proposed solely to enable TVA to engage in local utility distribution. TVA annulled the August 9, 1934 option-contract after this suit was instituted which challenged its validity; whereupon this Company was again confronted with the complete destruction in value of the distribution systems as a result of duplication of those systems by municipalities under privity of contract with TVA.

Hence TVA plans to engage in direct electric utility service to the public in respect to the transmission lines and the rural and urban distribution systems covered by the agreement of January 4 and will in effect engage in such service through the seventeen distribution systems. Relief, whether by way of declaratory judgment [as prayed specifically by the amended bill (R. III, p. 1278)], and reserved for supplemental consideration by the District Court (Conclusion No. 27, R. II, p. 1101), or by a decree more fully related to the facts as they existed at the time of the decree (viz., threatened duplication by federal loans for competitive systems to be operated by or under privity with, control and domination of TVA), seems not only appropriate but essential to the orderly disposition of this grave controversy.

The practice observed by this Court in *Penna. Coal Co. v. Mahon,* 260 U. S. 393, 67 L. ed. 322, invites determination of the grave questions on this record, which is complete and adequate to their full consideration by the Court.

Notwithstanding the considerations which induced the Company to the conclusion that it was not feasible to challenge the validity of the program without sacrifice of its utility position when the contracts in question were executed, the developments which took place before final decree in the District Court were ominous. Moreover, the amendment of the Tennessee Valley Authority Act of 1933 by the Act approved August 31, 1935 emphasizes this threat by supplying TVA directly, without necessity of recourse to Public Works Funds, with $50,000,000 with which to duplicate these systems. The rights asserted by the plaintiffs outside the limits of the contract of January 4, 1934, were and are clearly threatened with invasion by the acts of the Authority. Thus is established the existence in the judicial sense of a justiciable controversy. (*United States v. West Virginia,* 295 U. S. —, 79 L. ed. 848, 852).

Here relief is both necessary and proper. All parties are before the Court. Under the changed circumstances as outlined in the demands by the plaintiffs on the defendant Company dated December 11 and December 19, 1934 (R. II, pp. 494-501) it would not have been inappropriate for the Company to join the plaintiffs in a prayer for a declaratory judgment by cross-suit in that proceeding. The fact that subsequent events have thus clearly made it to the interest of the Company to acknowledge the necessity for suit of plaintiffs against the far reaching program in course of development by the Authority in no sense militates against the propriety for complete relief in the stockholders' suit. Compare *Chicago v. Mills,* 204 U. S. 321, 330, 51 L. ed. 504, 509.

In view of the destructive uncertainty surrounding the administration of the Tennessee Valley Authority Act and the far reaching construction of Article IV, Section 3, Clause 2 of the Constitution by the Circuit Court of Appeals in holding that the power to dispose of the property of the United States permits the United States to engage in the proprietary business of manufacturing electricity and supplying electric service to the public, the Company acknowledges that writs were properly sought by petitioners both in Nos. 403 and 404, and that the public interest would be furthered by granting the writs in both cases.

Respectfully submitted,

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